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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.

No. 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUITS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *City of New York*, No. 73-1377 (Pet. App. A, pp. 1A-34A), is

reported at 494 F.2d 1033. The opinion of the district court (Pet. App. E, pp. 59A–78A) is reported at 358 F. Supp. 669.

The opinion of the court of appeals in *Campaign Clean Water*, No. 73–1378 (Pet. App. B, pp. 35A–53A), is reported at 489 F. 2d 492. The opinion of the district court (Pet. App. F, pp. 79A–100A) is reported at 361 F. Supp. 689.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit in *City of New York* was entered on January 23, 1974 (App. C, pp. 55A–56A). The judgment of the Court of Appeals for the Fourth Circuit in *Campaign Clean Water* (Pet. App. D, pp. 57A–58A) was entered on December 10, 1973.

The petitions for writs of certiorari were filed on March 11, 1974, and were granted on April 29, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The question presented in *City of New York* is whether Sections 205(a) and 207 of the Water Pollution Control Act Amendments of 1972 authorize the Administrator, acting at the direction of the President, to control the rate of spending under the program by alloting less than the full amounts authorized by the Congress.

2. The question presented in *Campaign Clean Water* is whether the court of appeals, upon recognizing that the question whether the Administrator has discretion to allot less than the amounts author-

ized was no longer an issue in the case, should have directed the district court to dismiss the complaint instead of remanding the case for a hearing *de novo* to determine whether the Administrator abused his discretion in making the particular allotments.

STATUTES INVOLVED

The Administrative Procedure Act, in the introductory clause to Section 10, 60 Stat. 243, now 5 U.S.C. 701 (a)(2), provides:

> This chapter applies, according to the provisions thereof, except to the extent that * * * agency action is committed to agency discretion by law.

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1251 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of

all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

(b) (1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under thi section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to

which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

These actions seek to compel the Administrator of the Environmental Protection Agency to increase allotments he has made under Title II of the Water Pollution Control Act Amendments of 1972 ("the Act"). Allotment is a process under the statute by which the Administrator allocates from the sums authorized particular amounts to the eligible jurisdictions[1] pursuant to a percentage formula specified by Congress.

1. THE STATUTORY SCHEME

Title II creates a federal grant program under which the federal government pays 75 percent (Section 202 (a)) of the cost of building approved sewage treatment facilities. The granting of such funds takes place in several stages. First, the Congress authorizes appropriations for such grants (Section 207). Then the

[1] These are the states, the District of Columbia, and certain territories. See Table I, *infra*, p. 49.

Administrator makes allotments from the authorized amounts among the states pursuant to specified percentage formulas (Section 205). The Administrator then may approve qualified projects within the state out of each state's allotment (Sections 203, 204). Approval of a project constitutes an obligation of the United States. Finally, as grantees make expenditures on the approved projects, the sums due under the obligations are appropriated by the Congress and paid (Section 203(b)).

Sections 205 and 207 of the Act are directly involved in these cases. Section 207 authorizes appropriations "not to exceed" $5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. Section 205 provides that the sums authorized by Section 207 "shall be allotted" by the Administrator among the states. The Administrator has construed the statutes as empowering him to control the rate of spending by making allotments of less than the full amounts authorized by Section 207.

On November 28, 1972, the Administrator, acting pursuant to the direction of the President, allotted $2 billion for fiscal year 1973 and $3 billion for fiscal year 1974 (Pet. App. A, p. 7A). These actions are challenged in this litigation. On January 15, 1974, the Administrator, in an action not directly challenged here, allotted $4 billion out of the $7 billion authorized for fiscal year 1975.

As of May 31, 1974, not all of the sums allotted in November, 1972 had been obligated; substantially all of the $4 billion allotted in January, 1974 remained

available (see Table I, *infra*, p. 49). Only after the allotments already made have been fully obligated, and only if the President then decides not to authorize immediately further allotments, will the allotments here involved have any substantial effect on the rate of obligation and subsequent expenditure under the program.

Thus, the reduction in allotments here challenged has not in fact significantly reduced the rate of obligation and subsequent expenditure under this program. Rather, it has acted as a pre-set limit on obligation under the program, always subject to subsequent upward adjustment in response to later developments.

2. THE PARTICULAR CASES

A. CITY OF NEW YORK

On December 12, 1972, the City of New York filed a complaint in the United States District Court for the District of Columbia alleging that under Section 205 of the Act the Administrator was required to allot all sums authorized by Section 207—an additional $3 billion for 1973 and $3 billion for 1974 (App. 6–14).

The district court held that the Act imposed a mandatory duty to allot (Pet. App. E, p. 77A) and that control over the rate of spending should be exercised at the obligation, not the allotment stage (Pet. App. E, p. 72A). The court of appeals affirmed, holding that Section 205(a) imposes a mandatory duty on the Administrator to allot all sums authorized by Section 207 (Pet. App. A, p. 34A).

B. CAMPAIGN CLEAN WATER

On January 15, 1973, the plaintiff, an organization of Virginia ecologists, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that the defendant Administrator had a duty to allot all sums authorized by Section 207 or, alternatively, that his failure to allot more than 45 percent of the funds authorized was an abuse of discretion (App. 36–37). The district court held that the Administrator had discretion under the statute to allot less than the full amount authorized (Pet. App. F, pp. 95A–96A), but that his decision to allot only 45 percent violated the Act (Pet. App. F, p. 99A).

On appeal, the court of appeals, noting that the plaintiff conceded that the Administrator had discretion to allot less than the amounts authorized by Congress (Pet. App B, p. 39A), reversed the holding of violation of the Act on the ground that the record does not support this finding of "fact" (Pet. App B, pp. 47A–53A). The court of appeals held, however, that the exercise of the Administrator's discretion is subject to judicial review by a hearing *de novo* in the district court and remanded the case to that court for proceedings to determine whether there had been an abuse of discretion (Pet. App. B, p. 53A).

SUMMARY OF ARGUMENT

I

The Administrator's interpretation of Sections 205 and 207 as authorizing him to allot less than the

total sums authorized to be appropriated is supported by the language of the statute and its legislative history. These sections reflect two initial changes made by the conference committee: It eliminated the word "all" before the words "sums authorized to be appropriated pursuant to Section 207," which the Administrator is directed to allot; and it added the words "not to exceed" before the specific amounts authorized to be appropriated in Section 207.

Congressman Harsha, the floor manager of the bill, explained that these changes were intended to emphasize "the President's flexibility to control the rate of spending". 118 Cong. Rec. (daily ed.) H 9122. Similar explanations of the changes were given by the Senate floor managers. After the President vetoed the bill, Congress overrode the veto. In the debates on such overriding, the President's authority to control the rate of spending was again stressed. The legislative history thus shows that both the House and the Senate, on the original enactment of the bill and in overriding the Presidential veto, were fully aware that the Act gave the President authority to control the rate of spending because of the discretionary language employed in Sections 205 and 207.

The court of appeals failed to recognize that the rate of spending may be controlled through the allotment process as well as through the obligation process, and that there is no practical difference between exercising such control at the two stages. The court of appeals believed that control of the rate of spending

at the allotment stage could thwart the congressional intent that $18 billion be expended for water pollution control construction projects (Pet. App. A, pp. 19A–25A). The court unwarrantedly assumed that sums not allotted initially under Section 205 would "lapse" and be irretrievably lost to the States. There is nothing in the statute, however, which indicates any congressional intention to preclude the Administrator from making subsequent allotments until the entire $18 billion has been spent. The discretion that Congress gave the President acting through the Administrator, to control the rate of spending, may be exercised at the allotment stage. Such control may be exercised in the interest of overall government fiscal policies that are not related to the particular program involved.

II

In *Campaign Clean Water, Inc.*, the court of appeals should have directed the district court to dismiss the complaint once the plaintiffs had conceded that the Administrator has discretion in making allotments. The district court has no jurisdiction to determine upon remand whether the Administrator had abused his discretion in allotting only 45 percent of the funds authorized. Sovereign immunity bars litigation of the claim because the ultimate effect of the relief sought—the allotment of additional sums to the states—would require the expenditure of the funds of the United States. *Hawaii* v. *Gordon*, 373 U.S. 57; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337

U.S. 682. The Administrative Procedure Act does not waive sovereign immunity, and does not of itself confer jurisdiction. *Blackmar* v. *Guerre,* 342 U.S. 512, 515–516.

The Administrative Procedure Act is inapplicable because the Administrator's action was committed to agency discretion by law. 5 U.S.C. 701(a); *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317–319. The Water Pollution Control Amendments contain no criteria or standards governing the Administrator's exercise of his discretion. This is one of the rare instances where administrative action is precluded from judicial review because "there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410. The inquiry which the court of appeals directed the district court to make would require the court to decide a political question, involving managerial judgments by the President, which is not meet for judicial resolution.

ARGUMENT

INTRODUCTION

The Administrator interprets Sections 205 and 207 together as authorizing him to allot less than the total sums authorized to be appropriated. In his view, those sections impose a limit upon the amount he can allot—it cannot exceed the amount authorized—but do not require him to allot immediately all that has been authorized.

By allotting less than the full amounts authorized, the Administrator is able to reduce the funds avail-

able during a particular time period, *i.e.*, to reduce the rate of spending. This action was taken pursuant to a direction of the President, who, acting with the advice of the Office of Management and Budget, has the responsibility to evaluate the competing needs of this program and other claims on the limited total federal financial resources from which all expenditures are made.

At the time the original allotments were made, the Executive Branch had not considered whether further allotments could be made at later times until the full $18 billion was exhausted, *i.e.*, whether the allotment authority continued after the particular specific year for which the appropriation was authorized. Since it was assumed that Congress would be willing to authorize additional sums, the question whether such authorization was required before additional allotments could be made appeared to be of little practical significance. However, in response to a question from Senator Muskie to the Deputy Attorney General during hearings of the Ad Hoc Subcommittee on Impoundment of Funds on February 6, 1973, the Department of Justice studied this issue.

The Department concluded that the proper construction of the statute—the one which best accommodates its language and its legislative history—is that additional allotments may be made without further congressional authorization, at least until the time when reallotment of funds not utilized was re-

quired under Section 205(b).[2] The Department reported its conclusion to the Senate Committee on February 26, 1973,[3] but did not so inform the district courts in this litigation. The Department subsequently advised the Court of Appeals for the Eighth Circuit, in a supplemental brief filed in *State of Minnesota* v. *United States Environmental Protection Agency*, No. 73–1446, that the power to allot continues until the full $18 billion has been exhausted. The Executive Branch is now administering the statute under that construction of these sections.

Although the district court and the court of appeals in the *City of New York* case imply that the Administrator has authority to control the rate of spending at the obligation stage of this program (Pet. App. E, p. 72A; Pet. App. A, p. 23A), the government's present plan is to exercise that control only at the allot-

[2] Under Section 205(b) funds allotted but not obligated are to be reallotted one year after the end of the fiscal year for which authorized pursuant to the most recent allotment formula. That means authorized sums not obligated are withdrawn from all jurisdictions and the total then reallotted. This has two functions: (1) it ensures that the relative share of each jurisdiction is determined by more recent information on need; and (2) it, to some extent, transfers unused authorization from jurisdictions that have not made full use of their allotments to those that have. It is the position of the government that supplemental allotments made after the date for reallotment should be allotted according to the reallotment formula.

[3] Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Judiciary Committee, on Impoundment of Appropriated Funds by the President, S. 373, 93rd Cong., 1st Sess., 840–841.

ment stage. This procedure enables the states in their planning to rely on allotments once they have been made. However, if this Court should hold that the entire amount authorized must be allotted at the outset, the Administrator, in consultation with the President, will then have to decide whether to exercise his authority to impose comparable obligation controls for the same purpose.

In this consolidated brief we will first argue the question presented in *City of New York:* Does Section 205(a) require allotment of the full amounts authorized? In our view, if it does, then allotment is a ministerial act and the district courts have jurisdiction to order that it be done.

We will then argue the question presented in *Campaign Clean Water:* If discretion to allot less than the full amounts authorized exists, as was conceded by the plaintiffs and accepted by the court in that case, do the district courts have jurisdiction to review the exercise of that discretion?

I

SECTIONS 205(A) AND 207 OF THE ACT AUTHORIZE THE ADMINISTRATOR TO CONTROL THE RATE OF SPENDING UNDER THE ACT BY ALLOTTING LESS THAN THE FULL AMOUNTS AUTHORIZED TO BE APPROPRIATED

A. THE LANGUAGE OF SECTIONS 205(A) AND 207 DOES NOT REQUIRE THE ADMINISTRATOR TO ALLOT ALL THE AMOUNTS AUTHORIZED

Section 205(a) of the Act provides that "Sums authorized to be appropriated pursuant to section 207 for each fiscal year * * * shall be allotted by the

Administrator." Section 207 provides that, with respect to the years involved in this litigation, "There is authorized to be appropriated * * * not to exceed" $5 billion for 1973 and "not to exceed" $6 billion for 1974. The obligation to allot in Section 205(a) thus is defined by the appropriation authorization in Section 207, and the latter does not specify a specific amount but merely sets a maximum limit.

Section 205(a) does not require the Administrator initially to allot all the moneys authorized to be appropriated by Section 207; it merely directs him to allot "sums" so authorized. Section 207 provides broad discretion with respect to the amount authorized to be appropriated. In view of the interrelationship and parallel thrust of the two sections, we submit that Section 205(a) similarly gives the Administrator broad discretion to determine how much of the amounts authorized to be appropriated he will initially allot.

B. THE LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 SHOWS THAT CONGRESS INTENDED TO GIVE THE PRESIDENT, ACTING THROUGH THE ADMINISTRATOR, AUTHORITY TO CONTROL THE RATE OF SPENDING

The House bill (H.R. 11896, 92d Cong., 2d Sess.) provided in Section 205(a) that "all sums authorized * * * pursuant to section 207" shall be allotted by the Administrator, and in Section 207 specified the exact dollar amounts authorized to be appropriated—$5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. The Senate bill (S. 2770, 92d Cong., 1st Sess.) also provided in Section 205(a) that "all sums * * * authorized * * * shall be allocated

[allotted]" and Section 207(b)(1) authorized "not to exceed" an "aggregate of $12 billion" prior to July 1, 1976. Because of these and other differences in the two bills, the legislation was sent to conference on March 29, 1972, after passage of the House bill. After extensive deliberation, the conference committee reported an amended bill six months later on September 28, 1972.[4]

The Committee made two changes, the so-called "Harsha Amendments," which are critical to the question before the Court. First, it eliminated the word "all" from the requirement in Section 205(a) that the Administrator allot "all sums authorized" by Section 207. Second, it adopted the phrase "not to exceed" from the Senate bill as a qualification upon the amounts authorized to be appropriated by Section 207.

Congressman Harsha, the House floor manager of the bill and the author of the amendments, explained that "the elimination of the word 'all' before the word 'sums' in section 205(a) and insertion of the phrase 'not to exceed' in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. (daily ed.) H 9122. He continued (*ibid.*):

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[4] Senator Muskie, a Member of the Conference Committee, stated "I have been a Member of the Senate for 15 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope." 118 Cong. Rec. (daily ed.) S 16869.

> Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound monies from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.[5]

The same view was expressed in the subsequent colloquy among Representative Harsha, Representative Jones, the Chairman of the House Conferees, and Representative Ford. In response to a statement from

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[5] The fact that the Court of Appeals for the Eighth Circuit in *State Highway Commission of Missouri* v. *Volpe*, 479 F. 2d 1099, subsequently held that the highway statute does not authorize the obligation of lesser amounts than those allotted does not undermine the significance of the references to highway impounding in the legislative history. The Members of Congress who referred to highway impounding were referring to the practice (which, in spite of an adverse district court decision, 346 F. Supp. 950 (W.D. Mo., 1972)), they apparently still assumed to be proper as an example of the type of control the Executive Branch could exercise over spending under the Water Pollution Control Act Amendments.

Representative Ford that it was "vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report," Mr. Harsha stated:

> I do not see how reasonable minds could come to any other conclusion than that the language means we can obligate or expend up to that sum—anything up to that sum but not to exceed that amount. Surely, if the Executive can impound moneys under the contract authority provision in the highway trust fund, which does not have the flexible language in this bill, they could obviously do it in this instance.

Mr. Jones stated that he agreed with Mr. Harsha, pointing out that the latter "offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha)."

Mr. Ford then stated:

> Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years. [118 Cong. Rec. (daily ed.) H 9123.]

The discussion of the conference bill in the Senate similarly shows a recognition that the changes made in Sections 205(a) and 207 were intended to give the Executive Branch power to control the rate of spending. In explaining these two changes Senator Muskie,

although describing the change in Section 205(a) as providing that " 'all' sums authorized to be obligated need not be committed, though they must be allocated," stated that the changes in the two sections "were suggested to give the administration some flexibility concerning the obligation of construction grant funds" (118 Cong. Rec. (daily ed.) S 16871). Senator Cooper, a Senate conferee, noted that the funding of the legislation would total "over $24 billion—subject to the usual presidential responsibility for evaluating these needs in relation to other national priorities." 118 Cong. Rec. (daily ed.) S 16881. Senator Nelson stated, with respect to expenditure controls: "Only if the President's Office of Management and Budget or the Congress specifically directed otherwise would the money not be available at the levels in the legislation, according to my understanding." 118 Cong. Rec. (daily ed.) S 16888.

The President vetoed the bill, stating in his veto message that it would lead to excessive spending.[4] 118 Cong. Rec. (daily ed.) H 10266. The Congress then passed the bill over the veto.

In the Senate debates on overriding the veto, Senator Muskie challenged the President's view that the bill would lead to excessive spending, stating:

> [T]he President is in a position to control the amount of such authority that is used by the Administrator of EPA, and probably the Office of Management and Budget as well.

[4] The Administration had recommended expenditures of $6 billion. The Bill provided for an $18 billion grant program as well as $6 billion in other expenditures, a total of $24 billion.

> May I point out to the Senator that in the language of the authorization are the words "not to exceed." Obviously, those are words of control [118 Con. Rec. (daily ed.) S 18550–18551.]

Senator Cooper reviewed the history of the legislation at some length and explained that the conference amendments had been expressly intended to offset the $18 billion figure adopted in the final bill by giving the President the "option of impoundment" (118 Cong. Rec. (daily ed.) S 18551). Likewise, the following statement of Senator Baker, also a conferee, was read to the Senate by Senator Muskie (118 Cong. Rec. (daily ed.) S 18547):

> [T]he Congress has gone out of its way to make it clear to the President that the funds authorized by the water pollution bill did not have to be spent in their entirety.

It was on the basis of these statements of the President's authority to control spending that the Senate overruled the veto.

In the House debates on overriding the veto the same point was made. Representative Harsha stated (118 Cong. Rec. (daily ed.) H 10268):

> [W]e have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended

> to emphasize the President's flexibility to control the rate of spending.

Similarly, Representative Clausen, also a conferee, stated that it was "unfortunate that the President felt that he had to veto this bill" because of "his concern for the task he has of holding the reins on the Federal budget," since the effect of the Harsha amendments in eliminating the word "all" in Section 205(a) and the addition of the words "not to exceed" in Section 207 "gave the President the authority and the flexibility he needs to control the rate of spending" (118 Cong. Rec. (daily ed.) H 10272). In his closing remarks, just before the House voted to override the veto, Representative Clausen stated:

> It [should] have been abundantly clear that the President has the authority to control the rate of spending. This was the clear intent of the managers. [*Ibid.*]

This legislative history shows that both the House and the Senate, on the original enactment of the bill and in overriding the Presidential veto, were fully aware that the bill that was enacted gave the President full authority to control the rate of spending. The elimination of the word "all" from Section 205 and the addition of the words "not to exceed" in Section 207 were frequently described together as the means by which authority to exercise that control was assured. As we now show, such control may be exercised by allotting less than the total amounts authorized to be appropriated.

C. THE AUTHORITY TO CONTROL THE RATE OF SPENDING MAY BE EXERCISED BY ALLOTTING LESS THAN THE AMOUNTS AUTHORIZED TO BE APPROPRIATED

The court of appeals in *City of New York* concluded (Pet. App. A, pp. 19A, 23A), on the basis of its reading of the legislative history, that "while the Administrator might control the timing of future spending through delay of *obligation*, he must fully allot" and that "the amendments were intended to grant the executive discretion in the *obligation* phase, not in the allotment phase" (emphasis in original). As shown above, however, the legislative history does not support this conclusion. Indeed, the action of the conference committee, discussed above (pp. 15–16), in deleting the word "all" from the requirement in Section 205(a) for allotment of "sums authorized" by Section 207, supports the contrary conclusion. Virtually all of the discussion upon which the court of appeals relied was directed to the question whether the Executive Branch could control the rate of spending, and did not focus upon the stage at which such control would be exercised.

It is significant that those courts that have rejected the government's position in this case—following the opinion of the district court in *City of New York*[7]—

[7] *City of New York* in the court of appeals (Pet. App. A): *State of Minnesota* v. *Fri*, D. Minn., No. 4–73, Civ. 133, June 25, 1973; *Martin-Trigona* v. *Ruckelshaus*, N. D. Ill., No. 72–C–3044, June 29, 1973; *State of Texas* v. *Ruckelshaus*, W. D. Tex., C. A. No. A–73–CA–38, October 2, 1973; *State of Florida* v. *Train*, N. D. Fla., Civ. No. 73–156, February 25, 1974; *State of Maine* v. *Train*, D. Maine, Civ. No. 14–51, June 21, 1974; *State of Ohio* v. *Environmental Protection Agency, et al.*, N. D. Ohio, Nos. C. 73–1061 and C. 74–104, June 26, 1974.

have offered no explanation for the deletion of the word "all" from Section 205. But the two courts that attached any meaning to this change found that the power to control the rate of spending could properly be exercised at the allotment stage.[*]

We submit that the selection of the method by which the control of spending should be exercised—through restrictions upon allotment or upon obligation—lies within the sound discretion of the President and the Administrator. The issue is basically one of timing—at what stage in the administrative process are the controls upon the rate of spending to be imposed. If the Act gives the Administrator "control over the 'rate of spending,'" as the court of appeals recognized (Pet. App. A, pp. 25A–26A), there is no practical difference in result between exercising such control at the allotment or at the obligation stage (see *infra*, pp. 25–29).

The court of appeals, however, stressed the alleged distinction between control of spending at the obliga-

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[*] *Campaign Clean Water* in the district court (Pet. App. F, p. 95A): "[T]his interpretation * * * appears to de-emphasize the syntactical history of Section 205 which shows the purposeful removal of the word 'all' from §205." *Brown* v. *Ruckelshaus*, 364 F. Supp. 258, 269 (C.D. Calif.): "With all due respect to the judges who wrote those opinions, we believe that they are not correct. Neither the amendments nor the sponsors' statements received proper attention in any of the decisions. No one has convinced us that when a legislature removes the word 'all' from the phrase, 'All sums authorized to be appropriated shall be allotted,' they mean that every penny must be spent. Nor has anybody argued successfully that adding the phrase 'not to exceed' before a sum means anything more than that an upper limit must be imposed."

tion stage and control at the allotment stage. The court concluded (1) that the controls at the two stages are very different and that (2) control at the allotment stage interferes with the legislative objective of committing $18 billion to the program. In response to the Administrator's argument that "in terms of the impact on potential recipients, control over allotments and control over obligations would have the same effect" (Brief for appellant Administrator, p. 21, Reply Brief, p. 5), the court said (Pet. App. A, p. 31A):

> We disagree emphatically. Discretion over allotments necessarily confers discretion over the amount available to be spent and thus grants the executive the power to contravene the oft-stated legislative purpose to make federal money available. Could the Administrator allot $0? Happily, this is not the case, but the Administrator suggests no limit on his alleged discretion not to allot. Such authority would be greater than the power to control the rate of expenditures to which the sponsors repeatedly referred. Further, discretionary allotment would not be consonant with the overall concern, clearly expressed, of providing a total of $18 billion to combat water pollution. We find that discretion in obligation is distinctly different than discretion in allotment, and that it was only the former which this legislation was intended to confer.

A plausible but erroneous assumption underlies this reasoning: that control over the rate of spending and control over the amount of spending are very different things. This is not so. Control over the rate of

spending is necessarily control over the amount to be spent during a particular time period. A rate is defined as an amount of something during a given period of time. A rate can be reduced either by reducing the amount or extending the time period.

The court of appeals believed that control of the rate of spending at the allotment stage should not be permitted because such control could thwart the congressional intent to require that a total of $18 billion be expended on this program, *i.e.*, the amount authorized to be appropriated in Section 207 (Pet. App. A, pp. 19A–25A). Implicit in this conclusion is the apparent assumption that sums not allotted initially are thereafter lost to the program, *i.e.*, that the authorizations for the particular years provided in Section 207 lapse unless the funds therefor are allotted before the year expires. The assumption is unsound; the President and the Administrator have authority to continue to make allotments for as long as necessary, until the total amount authorized has been allotted.[9]

Although Congress provided in Section 205(a) that "[s]ums authorized" in Section 207 "shall be allotted

[9] Even if allotments not made did lapse, the only difference would be that Congress would have another occasion to examine the issues related to amounts and rate of spending under this program. Lapse is a doctrine which preserves continuing congressional authority over executive spending. Only if one assumes that the plaintiffs have some sort of entitlement to the 1972 authorizations of Section 207 apart from and in addition to any subsequent authorization by Congress, does the fear of lapse make any difference. Such an assumption is in error. This is not a case like *Work* v. *Louisiana*, 269 U.S. 250, where Congress had granted specific, unique property to the plaintiffs.

by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized," this provision, as we have explained, *supra*, pp. 14–15, does not require him initially to allot all sums so authorized. With respect to the sums allotted, Congress provided in Section 205(b)(1) that they "shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized," and that "[a]ny amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator." Congress thus provided that even with respect to sums initially allotted, they are to continue to be available indefinitely, subject only to reallotment.[16]

There is nothing in the statute which indicates any congressional intention to preclude the Administrator from subsequently allotting sums not initially allotted during the year for which the sums were authorized. To the contrary, it would further the congressional intent that the full $18 billion authorized be expended on the program, to permit the Administrator, if he initially allots less than the full amount authorized, to allot the balance at some future time when he considers it appropriate to channel further amounts into the pro-

[16] H. Rep. No. 92-911, 92d Cong., 2d Sess., p. 93, states: "[w]ith a periodic reallotment of unused allotments, the Committee expects each of the authorizations provided in section 207 to be ultimately used and has accordingly provided *indefinite appropriation authority* to permit the payment of the obligations *regardless of the year in which this may occur*." (Emphasis added.)

gram.[11] It was presumably for these reasons that the Fourth Circuit in *Campaign Clean Water* was "strongly pursuaded" that the Administrator has that authority (Pet. App. B, p. 51A).

Once it is recognized that the Administrator has authority to allot funds beyond the authorized years, then there is no practical difference in result whether the controls upon spending are exercised at the allotment or at the commitment stage. If the Administrator were required to allot all the sums authorized, he would then control spending by restricting the rate of obligation. Such controls upon obligations would be modeled on the spending controls used under the Highway Act, which were referred to in the legislative history (*supra*, pp. 17–18). After all the sums were allotted, the portion of them equivalent to the amounts that were originally allotted would be made available for obligation. The balance of the allotted funds would

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[11] The concept of continued authority to commit government funds is not novel. Cf. 31 U.S.C. 706, which provides for the withdrawal of "[t]he unobligated balances of appropriations * * * not limited to a definite period of time" only "whenever the head of the agency concerned shall determine that the purposes for which the appropriation was made has been fulfilled; or * * * whenever disbursements have not been made against the appropriation for two full consecutive fiscal years." Appropriations are defined to include contract authority. 31 U.S.C. 2. The determination that the purpose has been fulfilled is unlikely to be made here, since the 1975 needs survey made pursuant to Sections 205(b) and 516 showed total needs of $60 billion. See Costs of Construction of Publicly Owned Waste Treatment Works, H. Pub. Works Comm. Print 93–28, 93d Cong., 1st Sess., p. 2; Environmental Protection Agency, Costs of Construction of Publicly Owned Waste Water Treatment Works: 1973 Needs Survey, Table II, p. 12.

be placed in "reserve" accounts, which the Administrator could not commit until the accounts were released.

An illustration may clarify the point. For fiscal year 1973 New York was allotted $221,156,000 under the Water Pollution Control Amendments. If the full $5 billion authorized had been allotted instead of the $2 billion actually allotted, New York would have been allotted $552,890,000 under the 1973 allotment formula, an increase of $331,734,000. If full allotments had been made and obligation controls imposed, New York's total allotment of $552,890,000 would have been divided into two accounts. The amount of $221,156,000 would have been placed in one account, which the Administrator could have immediately obligated for qualified projects. The balance of $331,734,000 would have been placed in a reserve account, which the Administrator could not obligate until the funds were released.[12]

The court of appeals also relied on the provision of Section 206(f)(1) permitting the Administrator to

[12] This arrangement would not contravene the provision of Section 205(b)(1) that "Any sums allotted * * * shall be available for obligation * * * on and after the date of such allotment," because the sums in the reserve account would continue available until released. The Administrator's duty to act on applications "as soon as practicable" under Section 203(a) would not be violated because the obligation of funds by the Administrator from reserve accounts is not "practicable" if he has not been authorized to release them. Sums held in a reserve account more than one year after the close of the fiscal year would be reallotted under Section 205(b)(1), along with similar funds allotted to all other states, pursuant to the allotment formula dictated by the most recent needs survey. Likewise sums allotted after the time for reallotment should be allotted according to the reallotment formula.

obligate from future "expected" allotments. That section permits such obligation where allotments already made have been fully obligated, if a congressional authorization is in effect, and if the obligation will not exceed the expected allotment from that authorization. The court concluded that this section "would have scant operative effect if the 'state's expected allotment' could not be known because the Administrator had discretion to allot only a portion of such authorization" (Pet. App. A, pp. 33A–34A). This overlooks, however, an important fact. The "expected" allotment is the same as the state's likely percentage share of the total authorization because the expectation is not limited in time and the Administrator expects ultimately to release the full $18 billion.

Section 206(f) is part of the overall scheme of the statute which gives the Administrator power to control the rate of obligation under the program. Sections 205 and 207 give him power to slow the rate of obligation by deferring allocations. Section 206(f) gives him power to accelerate the rate of obligation beyond that dictated by the initial allotment dates of Section 205(a). Section 206(f) is consistent with the statutory plan conferring discretion on the Administrator to allot, and, the court of appeals suggested (Pet. App. A, p. 34A), with a mandatory duty to do so.

In sum, the Executive Branch did not abuse its discretion in making the judgment that the allotment stage is the proper occasion to exercise control over spending. There is nothing in the Act or its legislative history reflecting any clear congressional intent to bar the Executive Branch from exercising control at this

stage. In the absence of such congressionally shown intent, the courts should respect the expert judgment of the officials to whom Congress committed the administration of the program.

II

IN *CAMPAIGN CLEAN WATER* THE COURT OF APPEALS SHOULD HAVE DIRECTED DISMISSAL OF THE SUIT

In its complaint, Campaign Clean Water alleged that the Administrator had acted unlawfully because (1) he "lacks the discretion to refuse to allot among the states the full sums authorized by Congress" and (2) he abused his discretion "by withholding a greater amount of funds than contemplated by the Congress under the Act" (App. 36–37). During the litigation, however, the plaintiff abandoned the first claim, and when the case reached the court of appeals it involved only the second theory of illegality. As the court of appeals stated (Pet. App. B, pp. 39A–40A):

> The plaintiff concedes the Congress intended to give the executive certain discretion in making allotments under Section 205; the defendant Administrator asserts the existence of such discretion; and the District Court found that there was such discretion. The existence of discretion, therefore, is not in issue on this appeal. [Footnote omitted.]

Thus, the only portion of the complaint now relevant is the allegation that the Administrator abused his discretion by alloting less than Congress intended.

Once the court of appeals recognized that there is no issue in this case whether the Administrator has

discretion to allot less than the sums authorized, it should have directed the district court to dismiss the complaint. The district court had no jurisdiction to determine, as the court of appeals directed it to do on remand, whether the Administrator abused his discretion in alloting only 45 percent of the funds authorized. This is so for two reasons: (a) Sovereign immunity bars litigation of that claim, and (b) the only statutory basis the district court had for entertaining the claim—the Administrative Procedure Act—is unavailable because the claim involves a matter committed to agency discretion, so that the Act cannot apply.

A. SOVEREIGNTY IMMUNITY BARS THIS SUIT

1. *The suit is against the sovereign because it seeks to compel a government official to take affirmative action looking toward the spending of government funds.* The complaint in this case sought to compel action by the Administrator that would have the ultimate effect of requiring the expenditure of funds by the United States. The relief sought, in addition to a declaratory judgment, was an order directing the Administrator to increase the allotments he had previously made, and granting any other appropriate relief, including retaining jurisdiction to insure that the defendant does not by other unauthorized means "defer the obligation by states, municipalities, and other authorized agencies of allotted sums" (App. 37). The allotments, as explained above (pp. 5–6), constitute

the first step in the administrative process by which federal funds are provided to the states.

Since the allotments provide a ceiling upon the amounts which the states can receive, the increase in the allotments sought necessarily was intended to and ultimately would increase the funds the United States will furnish to the states. Indeed, the complaint recognized this by its request for possible other relief to prevent the Administrator from deferring the obligation of authorized funds. Obligation of funds is the mechanism by which the government actually commits funds to particular projects. Once the funds have been obligated, the state is entitled to receive them.

Such an attempt to compel a government official to take affirmative action that will result in the disposition of government property is an unconsented suit against the sovereign that is barred by sovereign immunity. See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *Dugan* v. *Rank*, 372 U.S. 609; *Malone* v. *Bowdoin*, 369 U.S. 643; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

Hawaii v. *Gordon*, *supra*, involved a similar situation. That was an original action by the State of Hawaii against the Director of the Bureau of the Budget challenging his interpretation of the Hawaii Statehood Act. The Act provided for the transfer by the United States to Hawaii of lands there that the United States no longer needed. The Director held that this provision applied only to lands originally ceded by Hawaii to the United States or lands ob-

tained for exchange of such lands, and not to lands obtained by the United States by purchase, gift or condemnation, and so advised other federal agencies. Hawaii's suit sought an order requiring the Director "to withdraw this advice to the federal agencies, determine whether a certain 203 acres of land in Hawaii acquired by the United States through condemnation was land or properties 'needed by the United States' and, if not needed, to convey this land to Hawaii" (p. 373 U.S. at 58).

This Court held that the suit was barred by sovereign immunity. It stated (*ibid.*):

> Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States.

The Campaign Clean Water challenge to the Administrator's discretion is subject to the same infirmities. It seeks to "require the [Administrator's] official affirmative action" of increasing the allotments; it would "affect the public administration of government agencies" by forcing the Administrator to change the basis upon which he is operating the program pursuant to the direction of the President; and it would cause "the disposition of property admittedly belonging to the United States," namely, a portion of the authorized funds that the Administrator had not yet allotted. Like the complaint that this Court dismissed in *Hawaii* v. *Gordon* because it was an unconsented "suit against the United States" *ibid.*), this ac-

tion also is barred by sovereign immunity.

2. *The case is not within the exception to sovereign immunity for situations where the government official acts beyond his statutory authority or unconstitutionally.* An exception to sovereign immunity is recognized "if the officer's action is 'not within the officer's statutory powers or, if within those powers * * * if the powers, or their exercise in the particular case, are constitutionally void.' " *Malone* v. *Bowdoin, supra,* 369 U.S. at 647, quoting from *Larson* v. *Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 702. Neither exception applies here.

a. Although the complaint alleged that the Administrator's action in allotting only 45 percent of the sums authorized was "unlawful" and "outside the scope of his discretion and authority" (App. 36), this claim does not establish that his action was not "within the officer's statutory powers." *Larson, supra,* 337 U.S. at 691–692, 702, discussed below. For, once it is acknowledged that the Administrator has discretion to allot less than the full amounts authorized, his discretionary act of determining the total amount to be initially allotted cannot be beyond his "statutory powers." Even assuming *arguendo* that it may involve error in exercising those powers, it is still within them and not beyond them. It is necessarily an exercise of those powers.

Larson and *Hawaii, supra,* both support this conclusion. *Larson* was a suit against the Administrator of the War Assets Administration to prevent him from disposing of coal that the Administration alleg-

edly had sold to the plaintiff. The plaintiff's right to the coal depended upon the interpretation of the sales contract between itself and the Administration. As in the present case, the complaint alleged that the Administrator "was acting 'illegally,' and that the refusal to deliver was 'unauthorized'" (337 U.S. at 691). The Court held that this allegation was insufficient to show that the Administrator was acting beyond his "statutory powers," since—

> There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. [337 U.S. at 703; see also, *id.* at 691–692.]

Similarly, in the present case the Administrator's statutory authority to allot less than the total amounts authorized includes the right to determine the amount to be initially allotted.

In *Hawaii* v. *Gordon*, the claim was that the Director of the Bureau of the Budget was acting on the basis of an erroneous interpretation of the Hawaii Statehood Act. Despite this claim of illegal action, the Court held that sovereign immunity barred the suit. Indeed, the present case is an even stronger one for

application of the doctrine. There the claim was that the government officer had misinterpreted an Act of Congress; here it is only that he abused his discretion in administering the Act.

b. The complaint does not allege that the Administrator acted unconstitutionally in alloting only 45 percent of the sums authorized, and it is difficult to see how any substantial constitutional challenge could be made to that action. The state's claim to the allotment of funds under the Federal Water Pollution Control Act Amendments rests wholly upon those Amendments, not upon any constitutional provision. There is not and could not be any valid claim that the Administrator's allotment action violated any rights of the State or its residents under the Fifth Amendment.

The court of appeals stated (Pet. App. B, pp. 46A–47A) that when the executive withholds from spending "so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review." But the court's characterization of the validity of the Administrator's refusal initially to allot more than 45 percent of the amounts authorized as presenting "an issue of constitutional dimensions" does not bring this case within the "unconstitutional action" exception to sovereign immunity. The theory of that exception is that when a government official acts unconstitutionally, it is not the action of the sovereign at all but the personal act of the official, since the latter cannot be acting for the sovereign when he exceeds the sovereign's

constitutional power. The validity of the amount of the initial allotments the Administrator made in the exercise of his statutory discretion does not even remotely approach an unconstitutional exercise of government authority.

c. Most cases in which the government official allegedly has acted beyond his statutory authority or unconstitutionally were situations where the plaintiff claimed that the property being held by the sovereign was his property. Cf. *Larson* and *Malone, supra.* In this case, however, as in *Hawaii* v. *Gordon,* the property which the plaintiff seeks to obtain is admittedly property of the sovereign, and the claim is that he is entitled to receive the property from the sovereign under a statutory right to entitlement. This Court recognized in *Larson, supra,* that such a claim is one against the sovereign and not subject to the exceptions for unauthorized or unconstitutional action:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will *require* affirmative action by the sovereign or *the disposition of* unquestionably sovereign property. [337 U.S. at 691, n. 11.]

Only where the official's duty to dispose of the sovereign's property is ministerial have the courts permitted suit to be maintained to compel its disposition. *Work* v. *Louisiana,* 269 U.S. 250; *Kendall* v. *United States ex rel. Stokes,* 12 Pet. 524. The present case, in which the plaintiff is seeking to compel a

government official to furnish him with greater government funds than the official believes is appropriate, is a suit against the sovereign.

3. *The Administrative Procedure Act does not waive the United States' sovereign immunity.* The circuits are divided over whether the sovereign immunity of the United States has been waived by the Administrative Procedure Act. Five courts of appeals have held that it has not been waived. *Littell* v. *Morton*, 445 F. 2d 1207, 1212 (C.A. 4); *State of Washington* v. *Udall*, 417 F. 2d 1310, 1320 (C.A. 9); *Motah* v. *United States*, 402 F. 2d 1, 2 (C.A. 10); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529, 532 (C.A. 8); *Cyrus* v. *United States*, 226 F. 2d 416 (C.A. 1).[13] Three circuits have taken the contrary view. *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859, 873–874 (C.A.D.C.); *Estrada* v. *Ahrens*, 296 F. 2d 690 (C.A. 5); Compare *Warner* v. *Cox*, 487 F. 2d 1301

[13] In *Littell* and *State of Washington*, however, the courts held sovereign immunity inapplicable because they concluded that the interests served by judicial review in the particular case outweighed the interests served by sovereign immunity, even though both actions sought to effect a disposition of sovereign property. See 445 F. 2d at 1213–1214, 417 F. 2d at 1320. *Littell* involved a claim for legal fees for services rendered. *State of Washington* involved a claim that certain water should be made available to the State without legal restrictions thought controlling by the agency. If the suit is against the sovereign, however, only Congress can waive immunity, and the courts cannot decide whether to entertain such suits based upon their evaluation of the relative interests to be served by judicial review in the particular case. In any event, the present action, involving an administrative process central to the operation of the entire executive branch (see *infra*, pp. 44–46), involves wholly different considerations.

(C.A. 5) and *Colson* v. *Hickel,* 428 F. 2d 1046 (C.A. 5); *Kletschka* v. *Driver,* 411 F. 2d 436, 445 (C.A. 2) (alternative ground for decision).

The cases holding that the Administrative Procedure Act waived sovereign immunity rely upon Section 10(a) of that Act (60 Stat. 243), now 5 U.S.C. 702, which provides: "A person * * * adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This section does not deal with jurisdiction, however, but only with standing. The provision dealing with jurisdiction, Section 10(b), now 5 U.S.C. 703, states that the "form of proceeding for judicial review is * * * any applicable form of legal action * * * *in a court of competent jurisdiction*" (emphasis supplied).

The Administrative Procedure Act does not of itself confer jurisdiction, but only prescribes the procedures for administrative review in courts having jurisdiction. Since sovereign immunity is a jurisdictional issue, the Administrative Procedure Act did not waive it. As this Court said of that Act in *Blackmar* v. *Guerre,* 342 U.S. 512, 515–516, "Still less is the Act to be deemed an implied waiver of all governmental immunity from suit."

B. THE ONLY BASIS UPON WHICH THE DISTRICT COURT MIGHT HAVE AUTHORITY TO HEAR THIS SUIT—THE ADMINISTRATIVE PROCEDURE ACT—IS INAPPLICABLE BECAUSE THE CHALLENGED ACTION INVOLVES A MATTER COMMITTED TO AGENCY DISCRETION

A district court may review an administrative order only if (1) the governing statute itself provides for review and the plaintiff has followed the statutory procedures, or (2) the Administrative Procedure Act

permits review. Neither basis is present here, and the court of appeals accordingly should have directed the district court to dismiss the complaint.[14]

1. The Federal Water Pollution Control Act Amendments authorize any citizen to file a civil action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator" and give the district courts "jurisdiction * * * to order the Administrator to perform such act or duty * * *" (Section 505(a)). This authority, however, is specifically subject to the requirement in subparagraph (b) that "No [such] action may be commenced * * * prior to sixty days after the plaintiff has given notice of such action to the Administrator."

The complaint in this case does not allege that subparagraph (b) was complied with, and the Admin-

[14] Campaign Clean Water also invoked the jurisdiction of the district court under the federal mandamus statute, 28 U.S.C. 1361. Since petitioner recognizes that the Administrator has discretion to allot less than the amount authorized, however, mandamus would not lie. That writ may issue only to compel performance of a ministerial act, but not to control the exercise of discretion. *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218; *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420; *United States ex rel. Girard Trust Company* v. *Helvering*, 301 U.S. 540, 543; *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309, 318. Section 1361 recognizes that limitation upon the use of mandamus, since it gives the district courts jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to *perform a duty* owed to the plaintiff" (emphasis added).

istrator has advised us that he was not given such notice. Indeed, the complaint on its face shows that the 60-day statutory notice could not have been given before it was filed. The action of the Administrator in allotting less than the total amounts authorized was announced on November 28, 1972 and the complaint was filed on January 15, 1973, only 48 days later (App. 33, 36, 37). Moreover, the plaintiff did not invoke the jurisdiction of the district court under this provision, but only under 28 U.S.C. 1331 and 1361 (App. 35).

Since Congress required, as a condition of invoking the jurisdiction of the district court under Section 505, that 60 days' notice be given to the Administrator prior to the filing of the suit, the failure to give such notice resulted in the district court having no jurisdiction under that Section. Since that section constituted a waiver of sovereign immunity, the terms upon which Congress consented to suit must be observed. *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Sherwood*, 312 U.S. 584, 590–591. The fact that had the plaintiff given such notice, it was unlikely that the Administrator would have changed his action, is immaterial. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

Finally, for the reasons we now discuss, the action of the Administrator here challenged was discretionary, and hence not covered by Section 505(a).

2. The judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701–706) are applicable "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to

agency discretion by law" (5 U.S.C. 701(a)). These two exceptions must be read together. The exception for matters "committed to agency discretion by law" covers more than the situation where the statute provides that the administrative action is not subject to judicial review, such as 38 U.S.C. 211(a), "which prohibits judicial review of decisions of the Administrator [of Veterans Affairs]" (*Johnson* v. *Robison*, No. 72–1297, decided March 4, 1974 (slip op. p. 3)). Rather, it reflects the congressional judgment that administrative determinations that turn upon the exercise of discretion are not to be judicially reviewed under the Administrative Procedure Act. *Panama Canal Co.* v. *Grace Line, Inc., supra*, 356 U.S. at 317–319.

In the *Panama Canal* case, the court held that a suit to compel the Canal Company to prescribe new tolls for the use of the Canal and to refund tolls allegedly illegally collected raised issues that were "by law committed to agency discretion" within the meaning of Administrative Procedure Act (356 U.S. at 317). Noting that determining the proper level of tolls for the Canal "involve[s] nice issues of judgment and choice * * * which require the exercise of informed discretion" and requires the Canal Company to make "questions of judgment requiring close analysis and nice choices" (356 U.S. at 317, 318), the Court concluded: "the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." (*id.* at 317).

Similarly, the action of the President, acting through the Administrator, in setting the levels of

allotment is committed to agency discretion by law. The words in the Administrative Procedure Act "by law" are not limited to a statute that specifically commits the matter to the agency, since that interpretation would render superfluous the other exception for situations where "statutes preclude judicial review." Rather, the determination whether a matter is committed to agency discretion depends upon the entire statutory scheme. Here, as we have shown above, the Water Pollution Control Act Amendments leave the making of the allocation to the discretion of the Executive Branch.

Indeed, unlike some statutes which provide guidelines for officials to consider in exercising their discretion (see, *e.g.*, *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604), here the governing statute does not announce any specific precepts that are to guide the President in determining allottments. On the contrary, the legislative history discussed above shows that Congress recognized that under the Act the President would have discretionary authority to control the rate of spending by initially committing less to the program than the total amounts authorized in Section 207.

The determination of the amount of funds to be allotted at a particular time is the essence of discretionary action, and is not subject to judicial revision upon the claim that the allottment actually made constituted an abuse of discretion. Indeed, it is difficult to formulate an appropriate basis upon which a court properly could review the validity of the President's

discretionary determination in setting the particular level selected.

The court of appeals suggested that on the remand the district court should consider whether there has been "a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals" (Pet. App. B, p. 46A), whether "the Administrator, in exercising his discretion under Section 205, acted so arbitrarily as to frustrate the attainment of the legislative goals" (*id.* 50A), and "whether the factors used by the defendant [Administrator] in fixing the allotments were the ones that were 'relevant' under a proper construction of the discretionary power found to exist in the executive" (*id.* 53A). In his letter directing the Administrator to allot not more than $2 billion for fiscal year 1973 and not more than $3 billion for the following fiscal year, however, the President stated that his decision, while "provid[ing] for improving water quality," "recognizes the highest national priority, the need to protect the working men and women of America against tax increases and renewed inflation" (App. 16).

In other words, the President ordered these particular limits upon the amounts to be allocated primarily to avoid a tax increase and inflation. It was because Congress recognized that the President should have discretion to control the rate of spending in order to further these interests that it authorized him, acting through the Administrator, to commit less to this program initially than the total amounts authorized.

In these circumstances, it was inappropriate for the court of appeals to direct the district court to conduct the freewheeling inquiry that would necessarily be involved in deciding such questions as whether the amount withheld through allotment would "frustrate" or "make impossible" the "attainment of the legislative goals." Such an inquiry raises extremely complex and difficult issues relating to the proper effectuation of legislative policies by the Executive Branch that the courts are ill suited to resolve. They involve determinations that Congress has committed to the executive branch of government, not to the judicial branch.[15]

The court of appeals may have been questioning whether the President properly could reduce allotments in order to further broad national fiscal policies not directly related to the Water Pollution Control Program itself. In *State Highway Commission of Missouri* v. *Volpe*, 479 F. 2d 1099 (C.A. 8), the court adopted that limited view of the scope of the Secretary of Transportation's discretionary authority to obligate

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[15] As the Administrator testified:

> If fiscal responsibility is to be achieved, as the President has resolved it will be, hard decisions to fund Federal programs at less than their maximums may be necessary. The inevitable criticism and controversy should not deter those decisions.
>
> "As I mentioned earlier, the responsibility to make the decision on funding was placed on the President's shoulders by the legislation itself. It is a difficult and complex responsibility and it has been carried out in the full context of a comprehensive and long-range policy directed toward the health and prosperity of the Nation.

Joint Hearings, *supra*, p. 405.

less than the total amounts authorized under the Federal-Aid Highway Act of 1956. There the court relied upon what it deemed to be indications that Congress did not intend to sanction withholding of funds under that statute as an anti-inflation measure (479 F. 2d at 1115–1116) and it interpreted the statute itself as providing that apportioned funds are not to be withheld from obligation for purposes totally unrelated to the highway program" (*id.* 1116, footnote omitted).[16]

The statute involved in this case, however, contains no such indication. To the contrary, as we have shown, the legislative history indicates that Congress recognized that the Executive could control the rate of spending because of general fiscal considerations unrelated to the program.[17]

In holding that the discretionary action of the Administrator in this case was not excepted from judicial examination by the Administrative Procedure Act's exemption for "matters committed to agency discretion," the court of appeals relied (Pet. App. B, p. 45A) upon this Court's statement in *Citizens to Pre-*

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[16] We submit that the court in *State Highway* misconstrued the statute there at issue.

[17] The question whether Congress's use of mandatory language can subsequently prevent the President from spending less than the total amount appropriated for a particular program, when the reduction is necessary to protect the financial integrity of the government, presents difficult and complex constitutional issues involving the allocation of powers. Since the legislative history shows that Congress recognized in the Water Pollution Control Act Amendments that the President would and should have discretion to control the rate of spending because of general fiscal considerations, there is no occasion for the Court here to reach the broad constitutional issues, and accordingly we do not discuss them.

serve Overton Park v. *Volpe*, 401 U.S. 402, 410 that "[t]his is a very narrow exception * * * that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" The present case is one of those "rare instances" since here, unlike the situation in *Overton Park*, Congress has not prescribed the standards the President is to apply in deciding how much of the amounts authorized are to be initially allocated. Although the Water Pollution Control Act Amendments specify in detail the criteria for determining whether a particular project should be authorized, they do not provide standards by which the discretionary allotment authority is to be exercised.

The inquiry which the court of appeals directed the district court to make would thrust the courts into the area of political judgments by requiring managerial decisions. Criteria fitted for judicial decision-making are absent. The district court would thus be asked to make a decision that courts have always eschewed as political questions. Such issues are not justiciable in the federal courts. *Colegrove* v. *Green*, 328 U.S. 549; *Baker* v. *Carr*, 369 U.S. 186, 208–237. "In determining whether a question falls within that [political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" (*Coleman* v. *Miller*, 307 U.S. 433, 454–455, footnote omitted). Both of these considerations show that the propriety of the amounts

the Administrator has initially allotted, pursuant to the direction of the President, presents an unstructured managerial issue or political question that is not for judicial resolution.

CONCLUSION

The judgments of the court of appeals in both cases should be reversed and the cases remanded to the district court with instructions to dismiss the complaints.

Respectfully submitted.

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—Activities of Grants Assistance Programs, May 1974, pp. 14–15.